LEE LIH LING

v.

ARAB-MALAYSIAN BANK BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[CIVIL SUIT NO: R1-12-244-2000]
7 AUGUST 2001

BANKING: *Banks and banking business - Banker's claim for repayment of debt under loan agreement - Whether banker should sell security and claim for shortfall sum or claim for full recovery of loan - Whether banker entitled to exercise any one remedy*

CONTRACT: *Loan - Recovery of - Banker's claim for repayment of debt under loan agreement - Whether banker should sell security and claim for shortfall sum or claim for full recovery of loan - Whether banker entitled to exercise any one remedy*

The appellant took a loan with the respondent bank to purchase a property under a loan agreement ('the loan agreement') and as a security thereof, the appellant assigned all his rights and interests under the sale and purchase agreement in respect of the property to the respondent. The appellant defaulted in his loan instalments and the respondent obtained a summary judgment for the outstanding sum against the appellant in the sessions court. The appellant appealed before this court and submitted that there was a conflict between ss. 6.01.2 and 6.01.4 of the loan agreement and that the respondent should sell the security and claim the shortfall sum instead of claiming the whole outstanding sum.

Held:

[1] Section 6.01.2 of the loan agreement should only be resorted to if the security was in jeopardy. However, this was not a case where the respondent acted on the ground of the security being in jeopardy. Even if s. 6.01.2 did come into play, there was no conflict with s. 6.01.4. Section 6.01.4 together with s. 6.01.3 entitled the respondent to sell the security but it did not oblige the respondent to do so. Under s. 6.02 the respondent was at liberty to choose any one remedy available under the loan agreement, including the remedy of suing for the full recovery of the loan. Section 6.01.4 merely provides for the appellant's obligation to pay the shortfall sum should the respondent choose to sell the security under s. 6.01.3 para. (ii). (p 717 c-d)

[2] It must have been s. 6.02 that the respondent resorted to in suing the appellant for the whole outstanding loan and not s. 6.01.2. Section 6.02 gave the respondent the right to exercise "all or any" of the remedies available to it. The respondent was entitled to choose only one remedy and it chose the remedy of a civil suit to recover "all monies due and owing to" it. The respondent was not bound to exercise the remedy of a sale of the security under s. 6.01.2. (p 717 e-f)

[Appeal dismissed.]

For the appellant/defendant - R Kengadharan; M/s R Kengadharan & Co
For the respondent/plaintiff - Prema Joseph; M/s Hamzah Sulaiman & Partners

Reported by Usha Thiagarajah

JUDGMENT

Abdul Aziz Mohamad J:
The respondent bank obtained in the Sessions Court summary judgment against the appellant on their claim for the repayment of a debt due under a composite loan agreement and assignment ("the loan agreement"). The appellant appealed.

The appellant had taken the loan from the bank to buy a property. Because the property did not yet have a registrable title, as security for the loan the appellant assigned to the bank all his rights and interest under the sale and purchase agreement in respect of the property. The assignment is in s. 9.01 of the loan agreement. Section 3.04 provides for the statutory charging of the property after issuance of the issue document of title to the property.

The bank's claim was grounded on breach of the loan agreement by the appellant by reason of default in paying the loan instalments.

The only point raised in submission on the appeal was one involving certain provisions in the loan agreement. I shall come to the point after setting out those and related provisions and making appropriate observations about certain of them.

Section 6.01.1 of the loan agreement sets out the events of default. Event (i) includes failure to pay a loan instalment.

Section 6.01.2 provides as follows:

> If the Lender is of the opinion that the security created under this Instrument is in jeopardy the Loan and any interest thereon and all other sums of monies (whether principal or interest) for the time being owing under this Instrument shall immediately become payable by the Borrower(s) to the Lender and the Lender shall forthwith become entitled to recover the same with interest thereon at the Default Rate and to exercise the rights and powers upon default herein and by law provided without any previous notice to or concurrence on the part of the Borrower(s).

It is a provision that was to be resorted to if the bank thought that the security was in jeopardy. The bank would then be entitled to recover the loan in full. The bank would also be entitled "to exercise the rights and powers upon default herein ... provided", which rights and powers, as will be seen, are provided in ss. 6.01.3 and 6.02. I straight away say, though, that whatever may be the bank's powers under s. 6.01.2, it could not have been the provision that they resorted to in this case because, as I said, their claim was grounded on the appellant's default in paying instalments, not on the security being in jeopardy.

Section 6.01.3 says that "Upon default in the manner hereinbefore provided the lender shall be entitled to exercise all or any of the ... rights and powers" listed in the section. They are rights and powers in relation to the property. They include, in para. (ii), the right and power to sell the property.

Section 6.01.4 provides for a matter consequential to a sale under s. 6.01.3 para. (ii), that is, the defendant's obligation to pay any shortfall to the bank on demand.

Section 6.02 provides as follows:

> Notwithstanding any provision hereof, it is hereby expressly agreed that upon default or breach by the Borrower of any term, covenant, stipulation and/or undertaking herein provided and on the part of the Borrower to be observed and performed, the Lender shall thereafter have the right to exercise all or any of the remedies available whether by this Agreement or by statute or otherwise and shall be entitled to exercise such remedies concurrently, including pursuing all remedies of sale or possession pursuant to this Instrument and civil suit to recover all monies due and owing to the Lender.

It is an overriding provision that would operate "Notwithstanding any provision hereof" in the event of default or breach by the appellant. By it, the bank were given the right to exercise "all or any" of the remedies

available to them, including those available under the loan agreement, and including moreover "civil suit to recover all monies due and owing to the Lender".

The appellant's point in the appeal, as advanced by his counsel, was that there was a conflict between ss. 6.01.2 and 6.01.4, and that being the case, the bank should have resorted to s. 6.01.4, as being the provision that was more favourable to the defendant, and not s. 6.01.2. What the appellant's counsel meant was that the bank should have sold the security and claimed the shortfall instead of claiming the whole outstanding amount.

I found that the point had no merit and dismissed the appeal. In the first place, s. 6.01.2 did not come into play because, as I said, this was not a case where the bank acted on the ground of the security being in jeopardy. In the second place, even if it did come into play, there was no conflict between ss. 6.01.2 and 6.01.4. Section 6.01.4, together with s. 6.01.3, entitled the bank to sell the security, but it did not oblige the bank to do so. Under s. 6.02 they were at liberty to choose any remedy available under the loan agreement, including the remedy provided by s. 6.02 of suing for the recovery of all moneys due, that is, full recovery of the loan. Section 6.01.4 merely provides for the appellant's obligation to pay the shortfall should the bank choose to sell the security under s. 6.01.3 para. (ii). In the third place, it must have been s. 6.02 that the bank resorted to in suing the appellant for the whole outstanding loan, not s. 6.01.2. Section 6.02 gave the bank the right to exercise "all or any" of the remedies available to them. They were entitled to choose to exercise only one remedy, and they chose the remedy of a civil suit to recover "all monies due and owing to" them. They were not bound to exercise the remedy of sale of the property given by s. 6.01.2.